

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION**

Case No. 08-10106-CIV-MARTINEZ/BROWN

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
DAVID W. DREIFORT and,)
DENISE DREIFORT,)
)
 Defendants.)

)

UNOPPOSED MOTION TO ENTER CONSENT DECREE

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the National Oceanic & Atmospheric Administration (“NOAA”), with the consent of Defendants David W. Dreifort and Denise Dreifort (“Defendants”), hereby moves this Court for entry of the Consent Decree agreed to and executed by the United States and the Defendants and lodged with the Court this date.

The Consent Decree resolves claims against the Defendants under the National Marine Sanctuaries Act (“NMSA”), 16 U.S.C. §§ 1431 *et seq.*, for damages and response costs resulting from the unauthorized placement of artificial lobster habitats, often referred to as ‘casitas,’ by the Defendants within the Florida Keys National Marine Sanctuary (“FKNMS”).

The Amended Complaint filed in this action alleges that from at least 1990 through the present, the Dreiforts have been placing a large number of artificial lobster habitats, or casitas, at various locations within the FKNMS for purposes of attracting, trapping, and harvesting lobsters, usually on hard-bottom marine biota habitat. The Amended Complaint alleges that, among other

consequences, these casitas have prevented sunlight from reaching organisms that require sunlight in order to survive and remain healthy, and have physically scoured the surfaces upon which they rest, thereby adversely affecting sanctuary resources, including organisms such as corals, gorgonians, sponges and other benthic sessile biota, which constitute essential habitat for fish and other sea life. The Amended Complaint seeks payment of response costs and damages incurred by NOAA as a result of damage to, and destruction of, marine sanctuary resources caused by the Defendants and their casitas, including costs incurred by NOAA in responding to the discovery of the casitas, in assessing injury to and losses of sanctuary resources caused by the casitas, in developing a plan to restore such sanctuary resources, and in implementing primary and compensatory restoration and restoration monitoring, plus interest and enforcement costs, pursuant to 16 U.S.C. § 1443(a)(1).

The Consent Decree resolves these claims by requiring the Defendants to liquidate two of three residential properties owned by them and paying the proceeds to NOAA's Damage Assessment and Response Fund (DAARF) as provided by statute, up to a maximum of \$1.1 million. The Defendants will also be enjoined from operating a vessel or engaging in fishing or shellfish harvesting within the FKNMS for five years from the date of entry of the Consent Decree.

In this circuit, the court may approve a proposed settlement agreement and enter a consent decree if it is not unlawful, unreasonable, or inequitable. *United States v. City of Hialeah*, 140 F.3d 968, 973 (11th Cir. 1998), *United States v. City of Jackson*, 519 F.2d 1147 (5th Cir. 1975). See *United States v. City of Fort Lauderdale*, 81 F. Supp. 2d 1348, 1350 (S.D. Fla. 1999) ("In this Circuit the court's role is limited at this juncture to determining whether the

terms of the consent decree 'are not unlawful, unreasonable, or inequitable.'") A reviewing court is generally to be at its most deferential in reviewing settlements obtained by agencies charged with primary responsibility for enforcing the environmental laws. *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991). This standard for entry of consent decrees under environmental statutes reflects a general public policy to encourage settlements as well as the expertise of the government agencies that negotiate such settlements. *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994).

The settlement in this case is lawful, reasonable, and equitable. Casitas damage marine sanctuary resources by preventing sunlight from reaching organisms, essentially smothering them. The resources impacted by casitas are not limited to the footprint of the habitat. Often, a "halo" or ring of denuded area surrounds each casita, adding to the impact of the structure on the resources under and around it. These structures are also known to move and slide, thereby scouring additional area outside the footprint of the structure. NOAA was able to calculate the number of casitas placed in the FKNMS during the period in question from GPS and other data obtained from the Defendants, and from that was able to estimate the cost of removing these casitas, which is the primary restoration remedy in this case.

There is also a compensatory remedy in this and most other marine sanctuary damage cases, which is intended to compensate the public for the lost use of sanctuary resources resulting from the damage caused by the casitas. NOAA used accepted modeling techniques to estimate the area of damage created by the casitas, and from that was able to estimate the cost of removing additional casitas in the FKNMS not placed there by the Defendants, as compensation for the lost use of resources caused by the Defendants' casitas.

The total estimated response costs and damages amount was then calculated by adding the estimated primary restoration, compensatory restoration, investigation, oversight, and monitoring costs. The Consent Decree requires the Defendants to pay these response costs and damages by selling two residential properties and paying the proceeds to the NOAA restoration fund, up to the sum of \$1.1 million. This figure is within the estimation range of the anticipated response costs and damages in this case. The United States has reviewed financial information provided by Defendants and has determined that this settlement properly takes into account the Defendants' ability to pay these costs and damages.

For all of the foregoing reasons, the United States, with the consent of the Defendants, moves the Court for entry of the proposed Consent Decree in this case. The proposed Consent Decree is attached hereto as an exhibit.

Respectfully Submitted,

Dated: March 20, 2009

/s/ Steven A. Keller
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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2009, the foregoing document, with exhibit, was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day via electronic mail and US Postal Service the following:

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